The petitioner had filed his petition for writ of mandamus to compel the Secretary of the Navy to record his name "upon the register of retired officers of the Navy as paymaster's clerk from the 27th day of June, 1910."

There was an answer to the petition, to which a demurrer was introduced; and petitioner electing to stand on his demurrer, an order of dismissal followed, which order was affirmed by the Court of Appeals of the District of Columbia.

The prayer of the petition is not that he shall be retired, but that his name shall be placed upon the register of retired officers of the Navy. The petitioner bases this claim, first, upon section 1444 of the Revised Statutes, which provides:

> When an officer below the rank of vice admiral is 62 years old, he shall, except in cases provided in the next section, be retired by the President from active service.

also upon the provisions of the act of June 24, 1910 (36 Stat. L. 606), amending the act of May 13, 1908, which provides:

> All paymasters' clerks shall, while holding appointment in accordance with law, receive the same pay and allowance and have the same rights of retirement as warrant officers of like length of service in the Navy.

The case as made out by the pleadings is substantially as follows:

In 1893 petitioner was appointed paymaster's clerk, for duty at the Navy pay office, San Francisco,

and he continued in such office until November, 1908, when, being then more than 62 years old, he was promoted to chief clerk at said pay office, which position he accepted, and served under this appointment until April, 1909, when he requested retirement under section 1444, Revised Statutes, which application was denied by the Secretary of the Navy. In November, 1910, he again requested retirement under the act of June 24, 1910, which request was also denied; and in January, 1911, he tendered his resignation, which was accepted.

The answer denies that the petitioner was at any time a paymaster's clerk in the Navy since 1893, and avers that he was in fact a civil employee and paid as such at a compensation greater than that to which a paymaster's clerk would be entitled. The answer also sets out facts showing that the Navy pay office at San Francisco is not such a station as would authorize the employment of a regular paymaster's clerk. The answer further avers that in 1896 the petitioner was placed on the classified civil service, and that by virtue of his appointment in 1893 he became a civil employee, and not an officer in the Navy, and therefore not entitled to retirement.

The contention of the petitioner is that the Secretary of the Navy, in refusing his application for retirement, misconstrued the provisions of the law above quoted, and denied him a right to which he was entitled. We submit that what is thereby drawn in question is, not the existence or scope of the

power or duty of the Secretary of the Navy, but that the Secretary erred in the administration of a statute.

This case is analagous to the case of *Snow* v. *United States*, 118 U. S. 346, which was dismissed in this court for want of jurisdiction. It was there contended that a court, established by an act of Congress and admitted to have lawful existence and jurisdiction of a case, misconstrued the act and went beyond the authority which it conferred; but it was held that all that was drawn into question was whether there was or was not error in the administration of the statute, and not "the validity of an authority exercised under the United States."

The court said:

> From the fact that a given criminal case involves the construction of a statute of the United States, it does not follow that the validity of "an authority exercised under the United States" is drawn in question.

In the case of *South Carolina* v. *Seymour*, 153 U. S. 353, the court refused a writ of error to review a case denying a writ of mandamus against the Commissioner of Patents, who had decided against issuing a trademark, upon the ground that, as the authority of the Commissioner of Patents was not assailed, but only his construction and interpretation of the law questioned, there was not drawn in question the validity of a statute of, or authority exercised under, the United States.

This court said:

> In order to come within this clause, the validity, and not the construction only, of a treaty or statute of the United States, or of an authority exercised under the United States, must be directly drawn in question.

A similar decision refusing to entertain jurisdiction of a writ of error to the Supreme Court of the District of Columbia, upon the ground that the validity of an authority exercised under the United States was drawn into question, was rendered in the case of *United States* v. *Lynch*, 137 U. S. 280, wherein a mandamus was sought against the accounting officers to require such officers to allow a claim for mileage which they had refused, under the act of 1835 and the decision of this court in relation to it. This court said:

> The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority, every time an act done by such authority is disputed. The validity of a statute or the validity of an authority is drawn in question when the existence, or constitutionality, or legality of such statute or authority is denied, and the denial forms the subject of direct inquiry.

This court in the *Lynch case* (*supra*) showed the distinction between an erroneous construction of a law by a Government officer, of which cases this court would not take jurisdiction on writ of error, and the cases where it would take jurisdiction,

namely, where the authority was directly questioned. In so doing the court said:

> In *Clayton* v. *Utah Territory*, 132 U. S. 632, the power vested in the governor of the Territory of Utah by the organic act, to appoint an auditor of public accounts, was drawn in question; and in *Clough* v. *Curtis*, 134 U. S. 361, 369, the lawful existence, as the legislative assembly of the Territory of Idaho, of a body of persons claiming to exercise as such the legislative power conferred by Congress, was controverted. * * * The existence or validity of the authority was primarily involved in these cases, and they contain nothing to the contrary of our present conclusion.

The authority of the respondent, the Secretary of the Navy, or his power or duty, is not drawn into question. The claim of the petitioner is that in the exercise of such authority the respondent erred and misconstrued the statute. Such a case is, we submit, clearly within the foregoing decisions where a writ of error was refused.

THE QUESTION SOUGHT TO BE REVIEWED IS A QUESTION OF FACT.

The petitioner bases his claim for a writ of mandamus to compel the Secretary of the Navy to place his name upon the register of retired officers of the Navy as paymaster's clerk on his appointment in 1893 and his service from that date to June 27, 1910, also upon his two applications to the Secretary of the Navy for such retirement, one under section

1444 of the Revised Statutes, and the other under the act of May 13, 1908, as amended by the act of June 24, 1910, both of which applications were denied.

The first refusal of the Secretary of the Navy states:

> The records of the department show that you have been employed as a civilian under the classified civil service since May 6, 1896. As you are not in the service as an officer in the Navy, you can not be transferred to the retired list as requested by you.

The second refusal of the Secretary of the Navy states:

> Mr. Foreman is a civil employe and therefore has no status for retirement under the laws governing retirement in the Naval service.

The Court of Appeals of the District of Columbia, in affirming the decision of the lower court, overruling a demurrer to the answer of the Secretary of the Navy and dismissing the petition for mandamus, said:

> He (Foreman) was at no time a paymaster's clerk in the technical sense but at all times attached to the particular office. He was no more an officer of the Navy than any one of the many employees of the Navy Department at Washington. We rule, therefore, that he never possessed any right to retirement. (38 App. D. C. 476.)

DISTRICT OF COLUMBIA, *ss:*

Patrick H. Loughran, being first duly sworn, makes oath that he prepared and has read the foregoing petition and knows the contents thereof, and that he subscribed same as counsel for George L. Foreman, the petitioner; that the statement of facts therein made as upon personal knowledge are true, and that those statements of facts made upon information and belief he believes to be true.

PATRICK H. LOUGHRAN.

Subscribed and sworn to before me this 7th day of January, 1913.

[SEAL.] EMILY F. CAMP,
Notary Public.

To Hon. George W. Wickersham, Attorney General of the United States, and Clarence R. Wilson, Esq., United States Attorney for the District of Columbia:

You are respectfully hereby notified that I will, on the 27th day of January, 1913, immediately after the opening of the court on that date, or as soon thereafter as may be convenient for the court to hear me, present to the Supreme Court of the United States the foregoing petition and brief for a writ of error to the Court of Appeals of the District of Columbia to have reviewed the judgment of that court in United States *ex rel.* George L. Foreman *vs.* George von L. Meyer, Secretary of the Navy (38 App. D. C., 472).

I beg leave to suggest that all intended opposition to the petition be made in a brief to be submitted at the time of presenting the petition, right of reply to any opposition being hereby waived.

PATRICK H. LOUGHRAN,
Attorney for George L. Foreman,
Petitioner (and Relator).

Receipt of a true and complete copy of the foregoing notice, petition, and brief on this 8th day of January, 1913, is hereby acknowledged by each of the undersigned.

WM. MARSHALL BULLITT,
Solicitor General.
CLARENCE R. WILSON,
U. S. Attorney D. C.
V. G.

In the Supreme Court of the United States.

OCTOBER TERM, 1912. No.—

UNITED STATES OF AMERICA EX REL. GEORGE L. FOREMAN, *Petitioner*,

v.

GEORGE VON L. MEYER, SECRETARY OF THE NAVY, *Respondent.*

ON PETITION FOR WRIT OF ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION.

This is not a case where the validity of an authority under the United States or the existence or scope of a power or duty of an officer of the United States is drawn in question, but the petitioner seeks by writ of error to have this court *review a question of fact.*

The petitioner, George L. Foreman, seeks a writ of error under the fifth clause of section 250 of the Judicial Code, to the Court of Appeals of the District of Columbia, to review the decision of that court in the above-entitled cause, which decision is reported in 38 Appeals, District of Columbia, 472.

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We therefore submit that the question which is now sought to be reviewed by this court upon a writ of error is purely and solely a question of fact—whether Foreman was an officer in the Navy and hence entitled to retirement or whether he was a civilian employee. The Secretary of the Navy and the court below found against him upon this question of fact, and he is precluded thereby on writ of error to the Supreme Court.

The writ of error herein sought should be denied.

WM. MARSHALL BULLITT,
Solicitor General.
CLARENCE R. WILSON,
United States Attorney, D. C.
REGINALD S. HUIDEKOPER,
Assistant United States Attorney, D. C.

JANUARY 20, 1913.